

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	CG Docket No. 02-278
)	
The Request for a Declaratory)	
)	
Ruling From Express Consolidation)	
)	
Inc.)	

**COMMENTS OF JOE SHIELDS IN REGARDS TO THE PETITION OF
EXPRESS CONSOLIDATION INC. FOR A DECLARATORY RULING ON
PREEMPTION OF THE FLORIDA TELEMARKETING STATUTE**

I respectfully submit these comments to the Commission in reply to the Petition for a Declaratory Ruling on Preemption of The Florida Telemarketing Statute filed by Express Consolidation Inc. (CG Docket No. 02-278, DA 04-3186A) with the Commission.

In the June 26th, 2003 adoption of the Commission Report and Order the Commission discussed at length the issue of consistency with State and FTC do not call rules¹. The Commission concluded that a single national do not call database was the most efficient and least confusing to consumers and telemarketers and that the Commission would work with the states to ensure harmony with the various state do not call data bases and the federal do not call database. Apparently this has occurred as envisioned by the Commission.

The issue Express Consolidation Inc. (hereinafter "Express") raises does not address any state or national do not call list. Express is asking the Commission to issue a declaratory ruling on preemption of state law civil actions brought under state law regulating prerecorded telephone messages in state courts. Express claims that the Florida state law is "inconsistent" with federal law.

As a threshold matter, the constitutional principles of preemption are designed to avoid conflicting regulation commonly referred to as "Conflict Preemption" or Congressional intent to occupy the field commonly referred to as "Field Preemption". Conflict preemption exists when compliance with both federal and state regulations is impossible. Field preemption exists when Congress left no room for States to supplement federal regulation.

¹ FCC Report and Order, FCC 03-153A1, Sec. 5, Para. 74-85 and Federal Record Publication: 68 FR 44144-01 Para. 52-63 [2003 WL 21713245 (F.R.)]

In the Express matter before the Commission there is no basis for preemption as no conflict exists between the state and federal statute. The Florida law is in harmony with the federal statute and merely places additional restrictions on prerecorded telephone messages² directed at the forum State of Florida. This is consistent with Congressional intent to create a floor (not a ceiling) for those that want to initiate prerecorded telephone messages. Furthermore, Congress in passing the Telephone Consumer Protection Act (hereinafter “TCPA”) decided not to occupy the field and used language within the statute to specifically permit the States to supplement federal regulation³. The Congressional intent together with the language within the TCPA is clear and concise: less restrictive state laws are in conflict with Congressional intent and are preempted but a more restrictive state law is not preempted.

Express can not only comply with both state and federal laws but must do so or find itself subject to state long arm civil and criminal actions – Oklahoma law criminalizes the initiation of prerecorded messages to residential and business telephone numbers without prior consent and Texas law criminalizes initiation of prerecorded messages to residential and business telephone numbers if the initiating device is not registered with the Public Utility Commission.

As to the Express claim to being a tax-exempt non-profit organization Express is registered with the IRS as such but their activity in the area of consumer credit counseling is anything but counseling and non-profit. According to the Express client agreement the first payment an “up front” fee and all other payments are paid to one Randall L. Leshin, Esq. of Randall L. Leshin P.A. a Florida for-profit business organization.

I would also like to point out that a Declaratory Ruling is an inappropriate venue to decide the issue. The FCC should, as is general practice, allow such issues to be decided in adversarial proceedings in the courts. In such court cases, both sides of the issue will be represented by interested parties, where in this action, only the Express position is represented.

Furthermore, to answer the questions raised by Express, multiple issues of construction and application of Florida law are critical to preemption analysis. Expertise in Florida law lies best with the Florida courts, who should be the ones to decide such questions. Just as federal courts sitting in diversity often defer questions of application and interpretation of state law to the state courts, the FCC should decline to decide this issue at this time, so the issue can be decided first by the Florida courts. Such a decision would likely explain and decide the relevant issues of construction and application of the state laws so that the FCC will have a more accurate and authoritative basis for application of preemption doctrines to the state law. Then and only then, should the FCC review that decision.

² 47 USC § 227 (e)

³ 47 USC § 227 (f)(6)

Consequently, I respectfully request that the Commission refrain from issuing a declaratory ruling in the Express Consolidation Inc. matter until such time as the matter is properly represented and fully presented before the Commission. Furthermore, I respectfully request that the Commission engage the services of the Internal Revenue Service and the Commissions sister agency the Federal Trade Commission to determine the validity of the Express claim to being a tax-exempt non-profit organization and if it turns out that such claim is unfounded that the Commission reinstate the Citation previously issued by the Commission against Express Consolidation Inc.

Respectfully submitted,

_____/s/_____

Joe Shields

Texas Government & Public Relations Spokesperson for Private Citizen Inc.
16822 Stardale Lane
Friendswood, Texas 77546

P.S. The petition submitted by Express includes a statement that a third party initiated the prerecorded telephone message on behalf of Express – the prerecorded telephone messages do not provide the name and contact information of such third party as required by the TCPA of all prerecorded telephone messages.

Hi, this is Rick Fletcher at Express Consolidation at 800-689-9014, extension 212. Umm, if you're currently making minimum or close to the minimum monthly payments on your high interest credit cards and you're not really making a dent in the balances, let us help you reduce your debt. We're a non-profit agency and we work with most banks and finance companies to lower interest rates, stop late fees, and stop those annoying collection calls. In fact, most of our clients reduce their payments by 20 to 50 percent by consolidating their bills through our service. But in order for me to reduce your payments before your next billing cycle I do need you to call me right away and let me know what your exact balances are and the names of those accounts. But, unh I'll tell you what, I'm gonna be in until midnight tonight, so call me when you get in at toll free 800-689-9014, extension 212, and I'll get you started on the program and tell you more about it. Thanks, I'm looking forward to hearing from you. Buh-by.